(8)

No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS, Warden,
Nebraska State Penitentiary,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

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Introduction

Beck v. Alabama, 447 U.S. 625 (1980), should not be read as announcing a federal constitutional commandment that our state and federal governments must enact lesser included offenses of every potentially capital offense under an 8th Amendment theory, or enact lesser included offenses of every known criminal offense under a Due Process Clause theory. That would represent an unwarranted judicial invasion of the legislative power.

By the same token, *Beck* should not be read as announcing a federal constitutional commandment that our state and federal governments must abandon their traditional lesser included offense jurisprudence simply to provide "lesser" offenses for juries to consider in potentially capital cases (8th Amendment), or to provide merely "lesser" offenses for juries to consider in every criminal case tried in this country (Due Process Clause).

For each of the reasons set forth below, Reeves' brief does nothing to alter those realities.

I.

The concept of lesser "related" offenses is not known to Nebraska law.

Reeves asserts that "Nebraska has always followed a 'lesser related offense' rule in all homicide prosecutions except felony murder." Respondent's Brief, p. 37. That statement does not accurately reflect the law of the State of Nebraska.

Our research has failed to disclose a single instance in which the term "lesser *related* offense" has been employed by the Nebraska courts.

The fact is that the Nebraska Supreme Court employs a lesser "included" offense analysis, not just in felony murder cases but in *all* first degree murder cases[1] and all *other* crimes tried within that jurisdiction.

Under either an "elements" or a "cognate" test, both of which the Nebraska Supreme Court has employed at times, the goal of the analysis remained the same: The determination of whether a lesser offense was "included" in the crime charged.[2] In that context, it is noteworthy that even as the Nebraska Supreme Court experimented with both the cognate and elements tests of lesser included offenses, the Nebraska Supreme Court never wavered in its conclusion that there existed no lesser included homicide offenses of first degree felony murder under Nebraska law. See Petitioner's Brief, p. 15.

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[1] E.g., *State v. Ryan*, 248 Neb. 402, 534 N.W.2d 766, 778 (1995) and *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507, 519 (1994) (lesser included offenses of first degree premeditated murder exist under Nebraska law); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340, 346 (1997) (there exist no lesser included homicide offenses to the crime of first degree felony murder).

[2] E.g., *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739, 742 (1990) (abandoned elements test for cognate-evidence test); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561, 566 (1993) (returned to elements test).

II.

Nebraska's lesser included offense jurisprudence is not the legal or functional equivalent of the statute found unconstitutional in *Beck*.

It is not clear to the petitioner, but if Reeves is attempting to argue that the Alabama statute found unconstitutional in *Beck* is the federal constitutional equivalent of Nebraska's well established lesser included offenses jurisprudence, that assertion is also inaccurate.

The statute found unconstitutional in *Beck* had application solely to crimes for which a penalty of death was to be imposed, this raises 8th Amendment concerns. The lesser included offense standard employed by the Nebraska Supreme Court is not limited in its application to first degree murder prosecutions, but is *uniformly* applied to *all* crimes tried in Nebraska. E.g., *Wiedman v. State*, 141 Neb. 579, 4 N.W.2d 566 (1942) (rape); *Haffke v. State*, 149 Neb. 83, 30 N.W.2d 462 (1948) (operating a motor vehicle on the public highways under the influence of alcoholic liquors); *Mulder v. State*, 152 Neb. 795, 42 N.W.2d 858 (1950) (assault with intent to do great bodily harm); *State v. McClarity*, 180 Neb. 246, 142 N.W.2d 152 (1966) (robbery); *State v. LaPlante*, 183 Neb. 803, 164 N.W.2d 448 (1969) (assault of a police officer); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995) (bribery); *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1966) (armed robbery); *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1977) (attempted first degree assault), *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997) (3rd degree assault of a police officer).

Thus, while the unconstitutional statute in *Beck* was limited in its application to capital offenses and thus implicated unique 8th Amendment concerns, Nebraska's lesser included offense jurisprudence has uniform application which extends well beyond the constitutionally unique environment of capital litigation.

III.

This Court has exercised jurisdiction over this case to resolve a federal constitutional question, not to resolve the respondent's dissatisfaction with the Nebraska Supreme Court upon a settled question of state law.

A.

In the 22 pages of argument here offered by Reeves, 14 pages[3] forward argument perhaps appropriate before the Nebraska Supreme Court, but not appropriate before this Court.

This body of argument exclusively addresses Reeves' disagreement with a century of Nebraska Supreme Court precedent on a pure question of state law: Are second degree murder and manslaughter lesser included offenses of the crime of first degree murder charged under a felony murder theory?

As we understand it, this Court is not burdened with the responsibility of addressing questions of state law for disgruntled state litigants. Under our federal system of government, and particularly in the context of a Due Process Clause analysis, a state's substantive law is not a

[3] Respondent's Brief, pages 30-44.

variable, but the fixed point from which any federal constitutional analysis must proceed. *Wolff v. McDonnell*, 418 U.S. 539 (1974). That point is fixed by the highest court of the state in question. State substantive law must be the exclusive province of the states and their courts.

However, Reeves urges this Court to substitute its judgment for that of the Nebraska Supreme Court on the question of what constitutes a lesser included offense of first degree felony murder under Nebraska law. For any federal court to assume responsibility for announcing or establishing the substantive law of a state is the antithesis of our American form of government and a path this Court has scrupulously and consistently rejected in the past. *Johnson v. Fankell*, 520 U.S. ___, 117 S.Ct. 1800, 1803-4, 138 L.Ed.2d 108, 115 (1997), citing *New York v. Ferber*, 458 U.S. 747 (1982).

If Reeves' proposition were to be adopted under a Due Process Clause theory, then every state and federal court's determination of what does or does not constitute a lesser included offense of the crime charged will suddenly and unnecessarily assume a previously unrecognized federal constitutional dimension. For example, in *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571, 574 (1984), the defendant argued that trespass was a lesser included offense of the charged crime of burglary. The Nebraska Supreme Court rejected that proposition under the same state law analysis as employed in denying Reeves his requested lesser included offense instructions.

B.

In the specific context of *Beck* and its progeny, this Court has never taken it upon itself to alter the substantive lesser included offense jurisprudence of a state. Instead, this Court has evaluated the federal constitutional implications of a state's lesser included offense jurisprudence *as defined by* that state's highest court.

Neither in *Beck*, nor *Hopper*, nor *Spaziano*, nor *Schad* did this Court second guess the highest court of the state in question with regard to that state's lesser included offense jurisprudence, nor did this Court alter a state's substantive lesser included offense law in the process of resolving those cases. Consistent with those holdings, this Court should decline Reeves' invitation to take a radically different approach in this case.

For example, in *Beck*, the unconstitutional statute specifically denied a criminal defendant charged with a mandatorily capital crime the benefit of instructions upon lesser included offenses otherwise existing and recognized under Alabama substantive law. Once that statute was voided by this Court, Alabama's substantive lesser included offense jurisprudence remained unaltered and applicable to Beck's case.

IV.

Reeves fails to meet either step of a *Beck* lesser included offense analysis.

The question of whether lesser included offense instructions may appropriately be given involves at least a two step analysis: (1) Do lesser included offenses of the

crime charged exist? (2) If lesser included offenses do exist, would the record support the giving of an instruction upon that lesser included offense?[4] Reeves fails at both steps of the analysis.

A.

No lesser included homicide offenses exist.

First, under Nebraska law there exist no lesser included homicide offenses of the crime of first degree felony murder. Reeves does not dispute this fact. Instead, Reeves and the circuit court simply ignore this crucial step of the analysis.

One cannot engage in an appropriate lesser included offense analysis if one begins by first *ignoring* the elements of the crime with which the defendant is charged. Here Reeves was charged with first degree murder under a felony murder theory. Any "lesser" offense would have to be "included" within the elements of *that* offense. Again, the Nebraska Supreme Court has held for a century that the "lesser" crimes of second degree murder and manslaughter for which Reeves requested instructions are not lesser included offenses of the crime with which Reeves was charged.

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[4] *Beck* at 636-637.

B.

The record does not support the requested instruction.

Having determined that the lesser offenses for which Reeves requested instructions are *not* lesser included offenses of the crime of first degree felony murder under Nebraska law, there exists no reason to engage in the second step of the traditional analysis recommended by this Court in *Beck*.

However, that is where Reeves *begins* his analysis. Reeves argues that the record at his trial would have supported a conviction of either manslaughter or second degree murder. Respondent's Brief, p. 28. Reeves is in error in that assertion as well. We offer the following in addition to our previously forwarded argument of this question.[5]

1.

While admitting that this record will not support it, Reeves nonetheless asserts that the petitioner conceded below that the record of Reeves' trial would have supported convictions for second degree murder or manslaughter. Respondent's Brief, p. 28. We have no recollection of that concession having been made.

[5] See our discussion of the second step of a *Beck* analysis found at pages 19-20 of the Petitioner's Brief on the Merits.

2.

More important, however, is the fact that the alleged admission, even if accurately represented, would be irrelevant to an appropriate analysis of this case.

This record cannot appropriately be examined from an abstract point of view which asks: "What crimes may have been committed here?" A lesser included offense analysis must begin *exclusively* in the context established by the crime charged by the sovereign.

a.

Reeves' argument ignores the undisputed fact that his state trial court specifically concluded that the record at his trial would not have supported the giving of the lesser offense instructions requested, even if there had existed lesser included homicide offenses of the crime charged. JA 3. We believe that finding is entitled to deference in this forum.

b.

Next, Reeves ignores the fact that his intoxication defense at trial was intended to accomplish one of two things: Prevent a finding that he formed the requisite intent for the first degree sexual assault, or establish that he was legally insane at the time of the offense.[6]

[6] The fact that Reeves actually committed these two homicides was never contested.

c.

In Nebraska, a lesser included offense instruction is only warranted where the defendant offers a theory which would allow him to be acquitted of the crime charged, but found *guilty* of the lesser included offense. *State v. Grant*, 242 Neb. 364, 495 N.W.2d 253, 259 (1993); *State v. Massa*, 242 Neb. 70, 493 N.W.2d 175 (1992).

d.

If Reeves were successful in convincing his jury that his voluntary intoxication prevented him from forming the requisite intent to commit a first degree sexual assault, that same level of intoxication would have also negated the intent to kill essential to conviction for the crime of second degree murder.[7]

e.

Next, Reeves argued that he was entitled to a lesser included offense instruction on manslaughter. Under Nebraska law the crime of manslaughter may be committed under one of two factual scenarios: either "upon a sudden quarrel" or "unintentionally while in the commission of an unlawful act."[8]

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[7] Neb. Rev. Stat. § 28-304 (1995): "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."

[8] Neb. Rev. Stat. § 28-305 (1995): "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."

"Sudden quarrel" manslaughter was not available to Reeves as a lesser included offense because the element of "sudden quarrel" is not common to the charged offense of first degree felony murder.

The commission of "unlawful act" manslaughter hinges upon the commission of an unlawful act. The only unlawful act alleged by the state here was the first degree sexual assault of Janet Mesner. First, if the only unlawful act alleged by the state is one of the enumerated predicate felonies of a felony murder, then there exists no theory under which Reeves' jury could have found him not guilty of felony murder but guilty of unlawful act manslaughter.

Second, sexual assault is a specific intent crime[9] which Reeves argued at trial he lacked the intent to commit. Again, if Reeves had lacked the ability to form the intent to commit the first degree sexual assault as the predicate felony to first degree felony murder, then he would have also lacked the intent necessary to establish the same predicate "unlawful act" for the crime of unlawful act manslaughter. Thus, instruction upon unlawful act manslaughter as a lesser included offense of first degree felony murder was not legally or factually appropriate on this record.[10]

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[9] JA 14.

[10] In the context of manslaughter, on this record it is also difficult to characterize these murders as "unintentional" when Reeves repeatedly inflicted mortal stab wounds to one victim and then stabbed his other victim cleanly through the heart in a single thrust.

f.

Finally, the fact is that Reeves' jury concluded that Reeves *did* possess the requisite criminal intent to commit the first degree sexual assault of Janet Mesner. Reeves' sole, intent-related defense having been rejected by his jury, he is in fact guilty of the crime with which he was charged, not of a "lesser" offense.

V.

Nebraska law recognizes lesser included offenses of first degree felony murder, but those do not include second degree murder or manslaughter.

A.

Reeves argues there is much confusion in Nebraska law on what constitutes lesser included offenses. However, on the specific question before this court – Are second degree murder and manslaughter lesser included offenses of first degree felony murder – Nebraska law is abundantly clear and consistent. See Petitioner's Brief, p. 15.

B.

While in *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974)[11] the Nebraska Supreme Court may have left open the possibility that extraordinary and unspecified circumstances might arise in which an exception could occur, the fact is that in nearly 150 years of

[11] Cited by Reeves at p. 41 and by *amici* National Association of Criminal Defense Lawyers at pp. 12-14.

criminal trials in Nebraska no such extraordinary circumstances have been observed and Reeves' situation does not create them. Reeves offers no authority to the contrary.

C.

Contrary to the argument of Reeves' *amici*,[12] Nebraska law does recognize that the predicate felony of a first degree felony murder charge is a lesser included offense of the crime charged. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 159, 178 (1997). However, as we have noted previously,[13] Reeves strategically elected *not to request* a separate instruction upon the predicate felony in this case. Instead, he requested instruction upon two crimes not recognized by Nebraska law as lesser included offenses of the crime with which Reeves was charged.

The Nebraska Supreme Court's statement in *State v. Price*, 252 Neb. 365, 562 N.W.2d 340, 346 (1997) that "there are no lesser included offenses to the crime of felony murder" must be read in the context that the appellant in *Price* was making exactly the same claim that had failed for Reeves and many others before him. The language from *Price* does not alter or contradict that court's holding in *Nissen*.

[12] Brief *Amicus Curiae* of the National Association of Criminal Defense Lawyers, pp. 12-14.

[13] Petitioner's Brief on the Merits, p. 32, fn. 28.

VI.

Petitioner's *Teague* claim is appropriately before the Court.

A.

This Court has indicated that questions of *Teague* waiver in this forum are ultimately addressed to the sound discretion of this Court. "[W]e undoubtedly have the discretion to reach the State's *Teague* argument." *Schiro v. Farley*, 510 U.S. ___, 114 S.Ct. 783, 127 L.Ed.2d 47, 56 (1993).

We believe that discretion has been appropriately exercised in this case by this Court's granting of a writ of certiorari with respect to Question #4.

B.

There are good reasons for a discretionary approach to *Teague* questions in this forum.

The concerns surrounding a *Teague* claim raised before this Court are significantly different than in the lower federal courts. The broad policy impact and systemic importance of the concerns which produced the *Teague* rule in the first instance recommend such an approach.

A *Teague* claim does not turn upon questions of disputed fact, but upon an accurate reading of the prior rulings of this Court. Therefore, this Court must review any *Teague* claim *de novo*. Thus, while the lower federal courts may be obliged to opine upon whether the rule urged by the state prisoner is a new rule of federal

constitutional law, only this Court has the power to dispositively resolve that question. Only this Court has the power to dispositively interpret the meaning of this Court's prior cases for our state and federal courts.

As this Court observed in *Schiro*, a party before this Court is entitled to raise any legal argument in support of its position. *Id.*, 127 L.Ed.2d at 56, citing *Dandridge v. Williams*, 397 U.S. 471 (1970). The concern in *Schiro*, relied upon by Reeves, was principally the State's failure to raise its *Teague* concerns at the *certiorari* stage of this Court's evaluation of the case. Those facts are not present here. See Petition for Writ of Certiorari, Questions Presented.

C.

We also note that the "new rule" at issue here is not a rule that Reeves urged below. Reeves had simply argued that instructions upon second degree murder and manslaughter were required under *Beck* as lesser *included* offenses.

It is the circuit court which departed from the lesser *included* offense context of *Beck* and its progeny, and in its place announced a federal constitutional mandate of instructions upon lesser *related* offenses regardless of the substantive law of the state in question.

Only this Court can dispositively enlighten us on the question of whether the circuit court's understanding of the demands of *Beck* is "new" to our federal constitutional jurisprudence. We proceed upon the assumption that this Court granted its writ of certiorari with respect to Question #4 in order to do so.

CONCLUSION

We believe the result here should be governed by 8th Amendment concerns. From an 8th Amendment standpoint *Beck* does not apply to Reeves' situation because Reeves' jury was not *commanded* by Nebraska law to impose a sentence of death or release Reeves from state custody. In fact, Reeves' jury was completely aware they had no role whatsoever in the determination of an appropriate punishment for Reeves if he was found guilty. Thus, Reeves' jury was not placed in a situation where concerns over punishment (mandatory or discretionary) might legitimately be argued to have impacted that jury's determination of Reeves' guilt. The mandatory death/impact-on-jury-deliberation concerns of *Beck* are simply not present here.

On the other hand, if a Due Process Clause analysis is deemed necessary, *Beck* does not apply to Reeves' situation because under Nebraska law, as defined by the Nebraska Supreme Court, Reeves was denied no recognized state law right to the lesser included offense instructions he requested.

Respectfully submitted,

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